

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 88-1886-Civ-Moreno

UNITED STATES OF AMERICA

Plaintiff,

v.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT, et. al.

Defendants.

**SOUTH FLORIDA WATER MANAGEMENT DISTRICT'S
MOTION TO VACATE CONSENT DECREE AND MEMORANDUM OF LAW**

This motion presents the following issue:

Significant changes to the managed Everglades system have occurred since this Court entered the 1991 Consent Decree.¹ These changes now make the Decree unworkable and detrimental to the public interest because the Decree's compliance equation prevents the District from sending more water south for Everglades restoration. Today, a Clean Water Act (NPDES) permit and legally adopted water quality standards—both durable remedies—are in place to ensure compliance. This Court should vacate the Decree and allow the State to rely on its durable remedies.

Therefore, the South Florida Water Management District ("District") moves to vacate the 27-year-old Consent Decree ("Decree") and dismiss this protracted litigation that stands today as the antithesis of Federalism² and an impediment to comprehensive Everglades restoration.

Memorandum of Law

Background

- A. The federal government filed this lawsuit to address high phosphorus levels from the EAA flowing into two federally managed sites.**

¹ Judge Hoeveler entered the 1991 Settlement Agreement as a Consent Decree (D.E. 1205) in 1992. It was modified (D.E. 1623) in 1995. It is cited in this motion as Decree at p. ___, ¶ ___.

² *Horne v. Flores*, 557 U.S. 433, 447 (2009); *Frew v. Hawkins*, 540 U.S. 431, 441(2004).

In 1988, the United States filed suit alleging that the Florida Department of Environmental Protection (“FDEP”) and the District (collectively, the “State” or “State Parties”) were allowing the ambient water quality in the Arthur R. Marshall Loxahatchee Wildlife Refuge (“Refuge”) and Everglades National Park (“Park”) to deteriorate below the quality that existed in 1979.³ The District owns the land for the Refuge and leases it to the United States. The District delivers water to the Park under a separate agreement with the federal government.⁴ Claiming breach of contract and damages, the U.S. alleged that the State Parties were violating state water quality standards.⁵ The federal government’s water quality concern was limited to nutrients, specifically, phosphorus discharges from the Everglades Agricultural Area (“EAA”) flowing into the Refuge and downstream to the Park.⁶ High phosphorus caused adverse changes to the natural flora and fauna in the Refuge, but the Park did not show such impacts. Nonetheless, the United States preemptively alleged that the Park would soon suffer from the same deviations in ecological characteristics.⁷

The State Parties counterclaimed, alleging that the U.S. Army Corps of Engineers (“USACE”) was equally responsible for moving polluted water into the Refuge and Park through unpermitted water control structures.⁸ The State further alleged that the U.S. had “unclean hands” for promoting the agricultural activities in the EAA and exempting agricultural stormwater runoff

³ Second Amended Compl. (D.E. 377) (Feb. 8, 1990), pp. 10-12.

⁴ See, Exhibit B to the Second Amended Compl.

⁵ Second Amended Compl. at p. 11.

⁶ *Id.* at p. 7.

⁷ *Id.* at p. 8.

⁸ Answer and Counterclaim of Fla. Dept. of Env. Reg. to Second Amended Complaint of the U.S. (D.E. 411) (March 22, 1990), pp. 16-24; Answer and Counterclaim of S. Fla. Water Mgmt. Dist. and Wodraska in Response to U.S.’s Second Amended Complaint (D.E. 401) (March 26, 1990), pp. 23-36.

from regulation under the Clean Water Act.⁹ Three years of contentious litigation ensued until the State convinced the Federal government to join the State's more comprehensive approach to saving the Everglades. The parties entered the July 26, 1991 Settlement Agreement, which Judge William Hoeveler converted into a Consent Decree on February 24, 1992. It is important to recognize that the Decree has no express or even implied termination date. Therefore, the Decree stands to govern the District's water management and Everglades restoration policies until the end of time.

B. The State's success depends on the federal government completing its original Modified Water Distribution project.

The Decree memorialized weighty aspirations. The parties pledged "mutual cooperation" to address both "water quality and water quantity," acknowledging it was "essential to implementing the actions necessary to achieve the [Decree's] commitments."¹⁰ The parties knew they needed to address more than just run-off from the EAA and "committed" to "take all actions within their authority necessary to provide adequate flows to meet the water quantity, distribution, and timing needs of the Park and the Refuge."¹¹ They also knew that those hydrologic factors impact phosphorus levels and, thus, flora and fauna. And the State had neither authority nor resources to address these factors alone.

The Decree required two remedies: the State must implement a Best Management Practices ("BMP") program for farmers to reduce the amount of phosphorus in the stormwater leaving their farms, and construct 37,000 acres of Stormwater Treatment Areas ("STAs") to reduce phosphorus

⁹ Answer and Counterclaim of Fla. Dep't. of Env'tl. Reg. to Second Amended Complaint of the U.S. (D.E. 411) (March 22, 1990), pp. 8-10; Answer and Counterclaim of S. Fla. Water Mgmt. Dist. And Wodraska in Response to U.S.'s Second Amended Complaint (D.E. 401) (March 26, 1990), pp. 20-21.

¹⁰ Decree at p. 26, ¶ 17.

¹¹ Decree at p. 12, ¶ 9.

from the EAA's stormwater before it discharges into five water conservation areas ("WCAs"), including the Refuge in WCA-1, and ultimately into the Park (collectively, the "Everglades Protection Area").¹² The Decree also required the State to develop a Research and Monitoring Program to determine the numeric nutrient levels that cause an imbalance in flora and fauna.¹³

The Decree provides that "compliance" will be measured by long-term phosphorus concentration limits that are determined by statistical equations contained in Appendices A and B of the Decree (the "Long-Term Limits").¹⁴ Appendix A governs the Park and Appendix B governs the Refuge. Successfully achieving these limits depends on a two-prong approach: (1) upstream control of phosphorus discharges, and (2) creating marsh-like sheet flows. The District is responsible for upstream phosphorus control using STAs and BMPs, and the federal government is responsible for creating the marsh-like sheet flows with its Modified Water Distribution project ("Mod Waters"). Without both prongs, consistently meeting the Long-Term Limits is impossible.

C. The compliance equation in Appendix A was established as an indicator of success with oversight from the Technical Oversight Committee.

The Technical Oversight Committee ("TOC"), comprised of technical representatives appointed by the parties, makes recommendations to the special master concerning research, monitoring, and compliance under the Decree.¹⁵ An "exceedance of the long-term limits will constitute a violation" unless the TOC determines the exceedance was "due to error or extraordinary natural phenomena."¹⁶

¹² Decree at pp. 13-15, 17-20.

¹³ Decree at pp. 3-4, 15, B-3, D-1.

¹⁴ *Id.* at pp. 4, A-2, B-1.

¹⁵ Decree at p. 26, ¶ 18

¹⁶ Decree at p. B-5.

The compliance measures were not intended as punitive.¹⁷ No penalties or fines are imposed for a “violation”—an unfortunate choice of terms under the circumstances. The limits were to instead provide feedback and sound the alarm. If the limits are not met, the Decree calls upon the TOC to determine why and, then, whether any additional EAA controls are advised.¹⁸ Those controls set forth in Appendices C and E are limited: more STAs and more BMPs are the sole remedies available to the TOC and, thus, this Court. The Decree provides no redress when the Long-Term Limits are breached by a cause other than EAA run-off, including those caused by natural phenomena, extraordinary or otherwise.

Argument

I. Circumstances have changed so significantly over the last 27 years that the Consent Decree is now unworkable and impedes comprehensive Everglades restoration.

The hydrologic assumptions used to develop the Decree’s compliance equation are no longer accurate. Water is delivered to the Refuge and the Park in different places, by different methods, in different quantities, and at different times than anticipated by the Decree. The equations used to measure compliance have become antiquated and unreliable. Compliance with the Long-Term Limits was meant to be a joint effort under a promise of “mutual cooperation,” but that aspiration was never realized because USACE did not complete its original Mod Waters project to create the hydrology upon which the equation was based. Thus, the very foundations of the Decree are shattered.

¹⁷ Report of the Special Master (D.E. 2235) (January 4, 2011), p. 102 (“... the Consent Decree is meant to succeed, not punish.”); *United States v. S. Fla. Water Mgmt. Dist.*, No. 88-1886, 2011 U.S. Dist. LEXIS 113167 at *36 (S.D. Fla., Sept. 28, 2011) (citing to the Special Master’s report, the Court agrees that a finding of a violation under the Consent Decree is not meant to penalize the State parties.)

¹⁸ Decree at p. 14, ¶ 10

A. The Decree contemplated a very different flow pattern than what exists today.

The compliance equation assumes conditions that never came to fruition through no fault of the State Parties. While the parties to the lawsuit were crafting what would later become the Decree, the District was independently completing its Surface Water Improvement and Management plan (“SWIM”); a technical plan that would later become the basis for the remedies in the Decree.¹⁹ Like the Decree, the District’s SWIM plan called for solutions to the ecological and water quality problems in the Everglades through the acquisition, design, and construction of stormwater treatment areas to treat runoff from the EAA.²⁰ But the SWIM plan and the Decree heavily relied on USACE’s Mod Waters project to significantly reduce, if not eliminate, flows through the S-333 structure into Shark River Slough within the Park.²¹ These modifications, anticipated for completion in 1997 and funded by the Department of the Interior, would have allowed a more naturally clean delivery through “sheet flow” into Shark River Slough.²² Because Mod Waters planned to reduce flows through the S-333, the Long-Term Limits established in the Decree were based on concentrations from the S-12 structures instead of the S-333.²³

But USACE never completed the original Mod Waters project, and the S-333 structure is still the nexus for flows into Shark River Slough today. The original Mod Waters project has significantly changed and remains incomplete until 2020, more than two decades after its

¹⁹ The SWIM plan was born out of the Marjorie Stoneman Douglas Everglades Protection Act, 1991 Fla. Laws Ch. 91-80, upon which much of the original Consent Decree was based. *See* Omnibus Order, p. 6 (D.E. 1623) (April 27, 2001).

²⁰ South Florida Water Management District, *Surface Water Improvement and Management Plan for the Everglades* (March 13, 1992).

²¹ *Id.* at Vol III, p. E-2.

²² *Id.*

²³ *Id.*

originally contemplated completion date.²⁴ When it is finally completed, it will be a vastly different project than was contemplated when the parties to the Decree formulated Appendix A.²⁵ The new Mod Waters will not reduce the use of S-333 or achieve a marsh-like sheet flow into Shark River Slough.²⁶ So, while the District implemented the first prong of the two-prong approach to achieving the Long-Term Limits by constructing almost double the amount of STA acres required under the Decree,²⁷ and executing a tremendously successful BMP program,²⁸ the Federal parties failed to uphold their end of the bargain, leaving the State beholden to compliance measures founded on a fallacy. The parties did not contemplate this vastly different circumstance.

B. The compliance equation does not recognize that higher flows are good for the Everglades but instead punishes the District for sending more flows and creating a “violation” of the Long-Term Limit in Appendix A.

Appendix A’s Long-Term Limit compliance methodology creates an inverse relationship between flow and concentration, in other words, the higher the flow, the lower the allowed concentration of phosphorus. Thus, without the anticipated Mod Waters project, Appendix A focuses solely on water quality, failing to properly consider quantity, timing, and distribution, despite the Decree’s recognition that all four elements are integral to restoration.²⁹ At the time it was developed, the parties thought this narrowly focused methodology would not be an issue

²⁴ US Army Corps of Engineers, Jacksonville District, *Integrated Delivery Schedule* (July 2018).

²⁵ US Army Corps of Engineers, Jacksonville District, *Environmental Assessment and Finding of No Significant Impacts for Modified Water Deliveries to Everglades National Park Project: Removal of Unconstructed Conveyance and Seepage Control Features*, pp. I, 1-4 – 1-10. (April 2017).

²⁶ *Id.* at pp. 2-1 – 2-4.

²⁷ Fla. Dept. of Env. Prot., Consent Order, OGC File No. 12-1148 (August 15, 2012).

²⁸ *Fla. Audubon Soc’y v. Sugar Cane Growers Coop. of Fla.*, 171 So. 3d 790, 797 (Fla. 2d DCA 2015).

²⁹ Decree at p. 12, ¶ 9.

because Mod Waters would address the remaining three elements. Nonetheless, the equation was narrowly tailored to the period in which it was created. Its pointed focus on phosphorus limits alone was meant to jump-start water quality improvement when phosphorus concentrations flowing into the Everglades Protection Area reached upwards of 320 parts per billion (ppb).³⁰ Today, the concentrations flowing into the Everglades Protection Area are between 15–40 ppb, so focusing solely on water quality while ignoring timing, distribution, and quantity no longer makes sense. But the equation was never updated to reflect the changes in circumstances—the lack of sheet flow—so the State’s ability to send the now clean water south for comprehensive restoration is curtailed by Appendix A’s rigid, unforgiving equation that renders healthy flows and compliance mutually exclusive.

C. The District is trying to increase flow to the Park for restoration, but is thwarted because to do so will cause a “violation” of the Long-Term Limit in Appendix A.

Appendix A impedes the State’s ability to complete additional projects necessary for a comprehensive approach to Everglades restoration. But the Decree was never meant to be restrictive. Nothing in the Decree expressly prohibits the State from undertaking additional measures to improve water quality and restore the Everglades. To the contrary, the Decree anticipated that all parties would do everything in their power to reduce phosphorus inflows from the EAA while still addressing the other elements necessary for restoration.³¹ Indeed, the State partnered with USACE on a wholistic approach to restoration, the 2000 Comprehensive Everglades Restoration Plan (“CERP”). CERP is a 50-50 partnership between the federal

³⁰ Burns & McDonnell, prepared for the South Florida Water Management District, *Everglades Protection Project: Historical Phosphorus Loads for the Everglades Agricultural Area*, Appendix C, Table C-6 (February 4, 1994).

³¹ Decree at p. 9, ¶¶ 4-6, pp. 12-13, ¶ 9, pp.20-25, ¶¶ 13-15B, p. 26, ¶ 17.

government and the District, but USACE is woefully behind on its commitment: USACE has only completed one of 68 CERP projects in 18 years and trails the District's spending by a billion dollars.³² Nevertheless, the District continues to fund and construct its components of CERP, only to find that threats of exceeding Appendix A will leave these essential pieces of the restoration puzzle as stranded investments. Because Appendix A serves as the State's water quality standards for the Park, FDEP cannot issue the District the requisite operational permits if operations of its CERP projects will cause "violations" to Appendix A.³³

This is the case for the \$12 million S-333N structure, designed to supply additional flow through the S-333 because Mod Waters never came to fruition.³⁴ But operating S-333N will mean higher flows into the Park minus the desired sheet flow, which triggers the absolute lowest Long Term Limit under the compliance equation: 7.6 ppb to be exact.³⁵ The Decree originally assumed the District would only be required to meet the 7.6 ppb limit 8% of the time with Mod Waters in place. Now, the lack of sheet flow coupled with the additional volume necessary for restoration will restrict the District to that lowest Long-Term Limit 47% of the time.³⁶ The District's modeling shows that it will be out of compliance with the lowest limit for a majority of the water year, but only by half a part to one and a half parts per billion—quantities that cannot even be detected by scientific instruments. In fact, phosphorus levels are measured in such miniscule amounts that calculating to the decimal is arbitrary and serves no meaningful purpose, but Appendix A requires

³² US Army Corps of Engineers, Jacksonville District, *Integrated Delivery Schedule* (July 2018).

³³ 62-302.540(4)(c), Fla. Admin. Code.

³⁴ Erdman Anthony, prepared for the South Florida Water Management District, *Final Design Report, S-333N Gated Structure* (June 12, 2018), Section 1.2 Project Description, pp. 23–24.

³⁵ *Id.*; See also Decree at p. A-2.

³⁶ *South Florida Water Management District Central Everglades Planning Project Post Authorization Change Report* (March 2018), Annex F, p. F-29, Figure F-12.

it. With these anticipated “violations,” FDEP will not have the required reasonable assurance that operating the S-333N will not cause or contribute to a violation of State water quality standards.³⁷ Therefore, FDEP cannot issue the permit and the District cannot operate the structure. The Federal parties’ initial failures have changed the circumstances to such a degree that the Decree is thwarting comprehensive Everglades restoration for the sake of meeting an arbitrarily low phosphorus concentration level.

D. The Decree is useless under the present circumstances.

The Federal parties’ solution to this pending catastrophe is to turn a blind eye until all 68 CERP projects are complete and the concentration levels are thereby low enough to meet Appendix A. That is, the State Parties should ‘trust’ that the three federal representatives on the TOC, who hold the majority, will agree to deem any exceedance at S-333 and S-333N an “extraordinary natural phenomena” or an “error,” to save the District from a recorded violation of the Decree.³⁸ Or the TOC can simply decide that there is an exceedance with no remedy available.³⁹ But if this is what enforcement of the Decree has come to—and it is—then the Decree serves no purpose and should be vacated on that fact alone.

³⁷ Sec. 373.1502(3)(b)2, Fla. Stat.

³⁸ The TOC deemed a 2008 exceedance as a “data error” and a 2017 exceedance as an “extraordinary natural phenomena.” *See TOC Meeting Notes* (March 1, 2011) (data error as cause for WY2008 exceedance), *TOC Meeting Notes* (May 1, 2018), and *Settlement Agreement Report, Third Quarter July – September 2017*, prepared for the TOC, (November 2, 2018), pp. 8, E-4 (WY2017 exceedance due to extraordinary natural phenomena).

³⁹ This occurred in 2012 and 2014. *See Notes from the Quarterly Meeting of the Everglades Technical Oversight Committee* (April 1, 2014), pp. 3-4, Item 4, and *Notes from the Quarterly Meeting of the Everglades Technical Oversight Committee* (October 27, 2015), pp. 3-4, Item 7; *See also* Technical Oversight Committee, *Associated Documents: WY2014 Annual Shark River Slough Compliance* (October 26, 2015).

It is undeniable that the conditions of today are not the conditions anticipated 27 years ago when the parties entered the Decree. To continue the status quo under the Decree is to condemn the State to unworkable and inequitable federal and judicial oversight to the detriment of the great public interest in comprehensive Everglades restoration.

II. A durable remedy is the required safeguard when vacating a consent decree. Here, the USEPA has approved state water quality laws and federal permits that provide greater protection to the Everglades than the Decree.

A consent decree serves one purpose: federal and judicial oversight to remedy a violation of federal law.⁴⁰ This Decree is inappropriately unique in that it affords federal and judicial oversight to alleged violations of *State* law.⁴¹ Nonetheless, when the defendant meets the overall objective of the consent decree⁴² and produces an independent durable remedy, the consent decree no longer serves a purpose.⁴³ Much has transpired since the adoption of the Decree 27 years ago. The District built 23,000 (67%) more acres of STAs than the Decree required; implemented a BMP program that, coupled with the STAs, reduced phosphorus loads into the Everglades Protection Area by up to 85%; executed a \$32 million research and monitoring program focused on quantifying phosphorus' effects on the Everglades. And above all of that, the District committed to continuing its efforts in improving water quality and restoring the Everglades through durable remedies blessed by the Federal agency instilled with regulating water quality: the United States Environmental Protection Agency ("USEPA").

⁴⁰ See *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1192 (10th Cir. 2018) (explaining the essence of a consent decree as the remedy to a violation of federal law).

⁴¹ *Id.* ("But a decree exceeds appropriate limits if it is aimed at eliminating a condition that does not violate federal law or does not flow from such a violation.").

⁴² *Id.* While *Jackson* provides that the overall objective of a consent decree is compliance with federal law, that analysis does not apply in this case because the State Parties were never in violation of federal law.

⁴³ *Id.* at 1206.

A. Florida’s Everglades Forever Act requires a suite of projects and programs to improve water quality, and the phosphorus rule establishes a protective numeric water quality standard for the Everglades.

The first of those USEPA-approved remedies occurred in 1994 when the State enacted the Everglades Forever Act (“EFA”), a State law aggressively focused on water quality and restoration in the entire Everglades Protection Area, not just the Refuge and the Park.⁴⁴ The EFA mandated phosphorus reduction through STAs and BMPs, the construction of projects to restore natural hydropatterns and hydroperiods, and implementation of a research and science program, and establishment of an exotic vegetation control program. In essence, the EFA took the remedies in the Decree, improved them, and then codified them as State law that applies to the entire Everglades Protection Area.⁴⁵ The USEPA oversaw and approved the creation of robust water quality regulations under the EFA.⁴⁶

The State’s unwavering commitment to research and monitoring paid off when Florida adopted its numeric water quality standards for phosphorus in the Everglades, also known as the “Phosphorus Rule.”⁴⁷ The USEPA deemed this 10 ppb standard and the accompanying “Four-Part Test” protective of the Everglades, and the Rule later withstood both Federal and

⁴⁴ “The EFA substantially rewrote portions of the Marjorie Stoneman Douglas Everglades Protection Act, 1991 Fla. Laws Ch. 91-80, upon which much of the original Decree had been based.” Omnibus Order (D.E. 1623), p. 6; *See* 373.4592, Fla. Stat.

⁴⁵ The Court in *Jackson* provided that a statute designed to cure the specific issue and a record of sustained good-faith efforts to eliminate the issue are examples of durable remedies. 880 F.3d at 1203.

⁴⁶ US Environmental Protection Agency, *Determination under section 303 of the Clean Water Act*, review of 62-302.540 of the Florida Administrative Code, (January 24, 2005); US Environmental Protection Agency, James D. Giattina, Director, Water Protection Division, *Letter Approving new and revised water quality standards in Rules 62-302.400 [Classification of Surface Waters, Usage, Reclassification, Classified Waters] and 62-302.530 [Table: Surface Water Quality Criteria] of the Florida Administrative Code* (September 6, 2011); United States Environmental Protection Agency, *Amended Determination* (D.E. 2203) (September 3, 2010).

⁴⁷ 62-302.540, Fla. Admin. Code.

administrative legal challenges.⁴⁸ The success of Florida's numeric standard on phosphorus in the Everglades is simple: phosphorus concentrations with a geometric mean of 10 ppb in the Everglades' marshes supports its low-nutrient environment.⁴⁹

B. A federal NPDES permit under the Clean Water Act requires stringent water quality compliance.

The District's STAs received a federal permit under the National Pollutant Discharge Elimination System ("NPDES") program in 1999. Then, after years of additional contentious legal battles, the State implemented Restoration Strategies in 2012, an \$880 million suite of projects to aggressively restore the Everglades and reduce phosphorus. With that development came an updated NPDES permit that confines the STAs to new numeric discharge limits.⁵⁰ These new limits are based on a scientific standard created jointly by the EPA and the FDEP called Water Quality Based Effluent Limit ("WQBEL").⁵¹ The Florida Southern District Court upheld the WQBEL as a protective standard.⁵² With the new NPDES permit and WQBEL in place, discharges from the EAA—through the STAs—no longer pose a threat to the Park, the Refuge, or the Everglades Protection Area. As Special Master Barkett recognized, solidifying an

⁴⁸ US Environmental Protection Agency, *Determination under section 303 of the Clean Water Act*, review of 62-302.540 of the Florida Administrative Code, pp. 5-6, 8, 10 (January 24, 2005); *Miccosukee Tribe of Indians v. Dep't of Env'tl. Protection*, Case No. 03-2884RP, 2004 Fla. Env. LEXIS 211 (DOAH June 17, 2004) (Final Order); *See also, Miccosukee Tribe of Indians of Fla. v. U.S.*, 2008 U.S. Dist. Lexis 57809, at * 42 (S.D. Fla. July 29, 2008) (recognizing that 10 ppb is protective of the Everglades).

⁴⁹ *Id.*

⁵⁰ NPDES Permit Renewal No. FL0778451 (September 10, 2017), Fla. Dep't of Env'tl. Prot., Consent Order, OGC File No. 12-1148 (August 15, 2012).

⁵¹ *See* Clean Water Act Sec. 301(b)(1)(C), 40 C.F.R. Sec. 122.44(d)(1) and (5), and Rules 62-650.200(14) and 62-650.300(1)(b), Fla. Admin. Code.

⁵² Case No.: 04-21448-Civ-Gold, *Order on Rule 60(b) Motion for Modification of Injunction Following Remand*, July 11, 2012, (D.E. No. 660).

enforceable WQBEL renders the Consent Decree's role in Everglades restoration debatable, at best.⁵³

The Decree's original purpose, to drastically reduce phosphorus discharges from the EAA into the Refuge and the Park, has been served. And with federally-approved durable remedies in place, the usefulness of the Decree lies squarely in the past.

III. The Consent Decree undermines the democratic process contrary to the principles of Federalism and the public interest.

If the Decree can dictate State and Federal water management policies; the tail is very much wagging the dog. Currently, the tail is in complete control. The State is suffering the most extreme blue-green algae crisis in its recent history, but State officials have limited options when making policy decisions to relieve the coastal estuaries. The State and the USACE are both bound by the archaic parameters of Appendix A, which proscribe them from sending additional clean water south to minimize the algae-laden discharges to the east and west. Indeed, this highlights the dangers associated with long-standing consent decrees: "they bind state and local officials to the policy preferences of their predecessors and thereby 'improperly deprive future officials of their designated legislative and executive powers.'"⁵⁴ This limit on state officials' ability to respond to the will of their constituents hinders their ability to carry out the duties they were elected to fulfill.⁵⁵ It is not insignificant that this Decree has outlasted six governors and will soon see its seventh.⁵⁶

Where the Federal government can use the Decree to impose their will on State water management policies, it builds a slippery slope. Today, the parties to the Decree agree that

⁵³ Report of the Special Master (D.E. 2235) (January 4, 2011), p. 32.

⁵⁴ *Horne*, 557 U.S. at 449.

⁵⁵ *Id.*

⁵⁶ Since entering the Decree, Florida has seated Governors Martinez, Chiles, MacKay, Bush, Crist, and Scott.

heightened phosphorus levels in the Park are the result of downstream, natural occurrences triggered when a heavy rain event follows a very dry period.⁵⁷ Importantly, the issue is not caused upstream by the EAA. This phenomenon causes false “violations” of Appendix A. To avoid these ‘false positives’, the federal government seeks to unilaterally broaden the scope of Appendix A as a basis to modify the Combined Operational Plan that governs how the District and USACE move water.⁵⁸ Doing so could result in consequences much more grave than violating Appendix A.

There are only two remedies available under the Decree, STAs and BMPs. Changing the way the District or USACE moves water is not one of them. This litigation and its Decree have taken on a life of their own and now advance a purpose unrelated to remedying the initial issue of high phosphorus from the EAA.⁵⁹ Water management and environmental restoration are key state functions and it is time that responsibility for discharging the State’s obligations be returned to the State and its officials.⁶⁰

⁵⁷ US Environmental Protection Agency, Office of Water, Office of Science and Technology, *Health and Ecological Criteria: Ambient Water Quality Criteria Recommendations: Information Supporting the Development of State and Tribal Nutrient Criteria for Wetlands in Nutrient Ecoregion XIII* (December 2000), Appendix A, p. 8.

⁵⁸ (Draft) *Exploring Flow Regulation Schemes to Reduce Total Phosphorus Concentrations and Loads Entering Everglades National Park’s Shark River Slough*, William W. Walker, Jr., Ph.D. prepared for US Department of the Interior (September 18, 2018); The Combined Operating Plan is a water control plan that defines water management operations for the constructed components of the Modified Waters Deliveries project and C-111 South Dade projects. See <https://usace.contentdm.oclc.org/digital/collection/p266001coll1/id/4300/>.

⁵⁹ See *Milliken v. Bradley*, 433 U.S. 267(1977) (But a decree exceeds appropriate limits if it is “aimed at eliminating a condition that does not violate federal law or does not flow from such a violation.”); See *Jackson*, 880 F.3d at 1197 (Recognizing that “the district court is in the best position to assess whether the litigation has taken on a life of its own and now advances a purpose removed from remedying the initial violations(s) or whether continued oversight remains necessary to ensure compliance with federal law.”).

⁶⁰ See *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th Cir. 2014); *Jackson*, 880 F.3d at 1196.

Precious public resources are being wasted and the State's attention is being diverted from more current, pressing priorities in Everglades restoration. With the NPDES permits in place, the Decree has become dormant except for the quarterly TOC and "subteam" meetings that are often rescheduled or canceled all together. These meetings have been reduced to agency representatives evaluating at great expense infinitesimal and infrequent variations in phosphorus levels that amount to trivial "exceedances." And it is undeniable that recent exceedances have absolutely no real-world impact on the ecology of the Refuge or the Park. The District has spent upwards of \$200,000 annually and countless public servant hours on preparing presentations and reviewing scientific reports that are ultimately ignored under the Decree. The Decree will continue to misdirect resources from the parties until it terminates. Ironically, the parties have no idea when that will be because the Decree dangerously lacks an end date.⁶¹ As long as it remains in place, Federalism and the public good are in jeopardy.

Conclusion

If a decree has been rendered obsolete and inequitable through changed circumstances, substantial compliance, and durable remedies, the public interest and the principles of federalism demand that it be vacated. After 27 years, the State of Florida has proven that it is more than ready to fulfill its duties and commitments to its citizens without unnecessary and duplicative federal and judicial oversight. Let progress prevail, let Florida restore the Everglades.

Referenced Materials

Documents referenced in footnotes 20–27, 30, 32, 34–36, 38–39, 46, 48, 50, and 57–58 will be included in a separate filing.

⁶¹ The Supreme Court has cautioned that federal courts should not continue their "oversight of state programs for long periods of time . . . absent a violation of federal law." *Frew v. Hawkins*, 540 U.S. 431 (2004).

Request for Oral Argument

The District requests oral argument to assist the Court in resolving the purely legal question presented by this motion and to decipher the technical setting in which it arises. Oral argument will allow the District to provide a roadmap for the Court to economically navigate the apparent complexities of this case and clarify its relatively simple and dispositive legal arguments on how the criteria for vacating the Consent Decree has been met. The District estimates arguments could be completed in one hour.

Local Rule 7.1(3) Pretrial Conference Certification

This certifies that counsel for the movant has conferred with counsel for the United States and counsel for the State of Florida Department of Environmental Protection in a good faith effort to resolve the issues presented by this motion and has been unable to do so.

Respectfully submitted this 8th day of November 2018.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT
Brian J. Accardo, General Counsel

By: /s/ Brian J. Accardo
BRIAN J. ACCARDO
Florida Bar No.: 55315
JULIA GILCHER LOMONICO
Florida Bar No.: 102633
3301 Gun Club Road
West Palm Beach, Florida 33406
(561) 682-6210
baccardo@sfwmd.gov
jlomonic@sfwmd.gov

Certificate of Service

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/s/ Julia Gilcher Lomonico

Florida Bar No.: 102633

Service List

Counsel	Representing
Mark A. Brown U.S. Department of Justice Environment and Natural Resources Division Wildlife and Marine Resources Section P.O. Box 7611 Ben Franklin Station Washington, D.C. 20044-7611 Suite 3036 601 D Street, N.W. Washington, D.C. 20004 (202) 305-0204 mark.brown@usdoj.gov Joseph T. Mathews United States Department of Justice Environment and Natural Resource Division PO Box 663 – Ben Franklin Station Washington, D.C. 20044-0663 (202) 305-0432 joseph.mathews@usdoj.gov Judith E. Coleman U.S. Department of Justice P.O. Box 7611 Washington, D.C. 20044 (202) 514-3553 judith.coleman@usdoj.gov Norman Hemming, III United States Attorney's Office 99 N.E. 4th Street, 3rd Floor Miami, Florida 33132 (305) 961-9000 Norman.hemming2@usdoj.gov	United States of America

Counsel	Representing
<p>Philip G. Mancusi-Ungaro U.S. Environmental Protection Agency 61 Forsyth Street Atlanta, Georgia 30303 mancusi-ungaro.philip@epamail.epa.gov</p>	
<p>John M. Barkett Shook Hardy & Bacon Miami Center, Suite 2400 201 South Biscayne Blvd. Miami, Florida 33131-4332 (305) 358-5171 jbarkett@shb.com</p>	Special Master
<p>Charles A. DeMonaco Fox Rothschild, LLP BNY Mellon Center Suite 2500 500 Grant Street Pittsburgh, Pennsylvania 15219 (412) 394-6929 cdemonaco@foxrothschild.com</p> <p>Jennifer Lee Fitzwater Department of Environmental Protection 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, Florida 32399-3000 (850) 488-9314 jennifer.fitzwater@dep.state.fl.us</p> <p>Charles Thomas Collette Department of Environmental Protection 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, Florida 32399-3000 (850) 245-2220 Charles.Collette@dep.state.fl.us</p> <p>Lee M. Killinger Department of Environmental Protection 2600 Blair Stone Road Mail Station 35 Tallahassee, Florida 32399-2400 (904) 488-9730 Lee.Killinger@dep.state.fl.us</p> <p>Stephen J. Darmody Darmody Carta, P.A. Suite 305 201 Sevilla Avenue Coral Gables, Florida 33134 (202) 898-5897 sdarmody@hollingsworthllp.com</p>	State of Florida Department of Environmental Protection

Counsel	Representing
<p>Charles A. DeMonaco Fox Rothschild, LLP BNY Mellon Center Suite 2500 500 Grant Street Pittsburgh, Pennsylvania 15219 (412) 394-6929 cdemonaco@foxrothschild.com</p> <p>Christopher M. Kise Foley & Lardner LLP Suite 900 106 East College Avenue Tallahassee, Florida 32301-7732 (850) 222-6100 ckise@foley.com</p> <p>Gregory M. Munson Gunster, Yoakley & Stewart, P.A. Suite 601 215 South Monroe Street Tallahassee, Florida 32301 (850) 521-1980 gmunson@gunster.com</p> <p>Kenneth B. Hayman Department of Environmental Protection 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, Florida 32399-3000 (850) 245-8672 Kenneth.Hayman@dep.state.fl.us</p> <p>David Alexander Crowley 3900 Commonwealth Blvd, MS 35 2494 Augustine Court Tallahassee, Florida 32311-9393 (850) 245-2242 David.Crowley@dep.state.fl.us</p> <p>Stephen J. Darmody Darmody Carta, P.A. Suite 305 201 Sevilla Avenue Coral Gables, Florida 33134 (305) 588-3625 sdarmody@darmodylaw.com</p>	<p>State of Florida Department of Environmental Protection</p>
<p>Jeanine Bennett Miccosukee Tribe of Indians of Florida PO Box 440021 Tamiami Station Miami, Florida 33144 (305) 223-8380 ext. 5211 jeanineb@miccosukeetribe.com</p>	<p>Miccosukee Tribe of Indians</p>

Counsel	Representing
<p>Kelly Brooks Smith 1111 Brickell Avenue Suite 2050 Miami, Florida 33131 (305) 377-4100 bgbrooks@bellsouth.net</p> <p>Samuel Barclay Reiner, II Reiner & Reiner PA 9100 S Dadeland Boulevard Suite 901 Miami, Florida 33156-7815 (305) 670-8282 sbr@reinerslaw.com</p> <p>Steven M. Davis Becker & Poliakoff, PA 121 Alhambra Towers 10th Floor Coral Gables, Florida 33134 (305) 262-4433 sdavis@becker-poliakoff.com</p> <p>Claudio Riedi Lehtinen Schultz Riedi Catalano de la Fuente 1111 Brickell Avenue, Suite 2200 Miami, Florida 33131 (305) 760-8541 criedi@lsrcf.com</p>	
<p>Richard Lewis Blaylock Earthjustice Legal Defense Fund 111 S Martin Luther King Jr. Blvd Tallahassee, Florida 32301 (850) 681-0031 richard.blaylock@pillsburylaw.com</p>	<p>Sierra Club National Wildlife Federation National Parks and Conservation Association Defenders of Wildlife Treasure Coast Environmental Coalition Florida Audubon Society Florida Wildlife Federation Florida Keys Citizens Coalition Environmental Defense Fund</p>
<p>Bradley Ian Brustman Marshall Earthjustice Legal Defense Fund 111 S Martin Luther King Jr. Blvd Tallahassee, Florida 32301 (850) 681-0031 bmarshall@earthjustice.org</p> <p>Alisa Ann Coe Earthjustice Legal Defense Fund 111 S Martin Luther King Jr. Blvd Tallahassee, Florida 32301 (850) 681-0031 acoe@earthjustice.org</p>	<p>Sierra Club National Wildlife Federation National Parks and Conservation Association Defenders of Wildlife Florida Wildlife Federation Audubon Society of the Everglades</p>

Counsel	Representing
<p>Tania Galloni 4500 Biscayne Blvd Suite 201 Miami, Florida 33134 (850) 681-0031 tgalloni@earthjustice.org</p>	<p>Sierra Club National Wildlife Federation National Parks and Conservation Association Florida Wildlife Federation Audubon Society of the Everglades</p>
<p>David G. Guest 525 W. 8th Ave Tallahassee, Florida 32303 (850) 228-3337 david@davidguestlaw.net</p>	<p>National Wildlife Federation National Parks and Conservation Association Defenders of Wildlife Florida Wildlife Federation Audubon Society of the Everglades</p>
<p>Edwin Thom Rumberger Rumberger Kirk & Caldwell 215 S Monroe Street, Suite 702 Tallahassee, Florida 32301 (850) 222-6550 rumberger@rumberger.com</p> <p>J. Kendrick Tucker Guilday Tucker Schwartz & Simpson, P.A. PO Box 12500 Tallahassee, Florida 32317 (850) 224-7091 ken@guildaylaw.com</p> <p>Sharon Jablonski Henry Rumberger Kirk & Caldwell 300 South Orange Avenue Suite 1400, PO Box 1873 Orlando, Florida 32802-1873 (407) 872-7300 sduncan@rumberger.com</p> <p>Anna Holt Upton Anna H. Upton, P.L. 9005 Eagles Ridge Drive Tallahassee, Florida 32312 (850) 228-6360 anna@ahupton.com</p> <p>Noah D. Valenstein Rumberger Kirk & Caldwell PA 215 S Monroe Street, Suite 130 Tallahassee, Florida 32301 (850) 222-6550 nvalenstein@rumberger.com</p> <p>Suzanne Barto Hill Rumberger Kirk & Caldwell 300 South Orange Avenue Suite 1400, PO Box 1873 Orlando, Florida 32802-1873 (407) 872-7300 shill@rumberger.com</p>	<p>Florida Audubon Society</p>

Counsel	Representing
<p>David P. Reiner, II Reiner & Reiner PA 9100 S Dadeland Boulevard, Suite 901 Miami, Florida 33156-7815 (305) 670-8282 dpr@reinerslaw.com</p>	<p>Friends of the Everglades (Amicus)</p>
<p>Paul C. Savage The Law Offices of Paul C. Savage, P.A. 100 Almeria Avenue, Suite 220 Coral Gables, Florida 33134 (305) 444-7188 paul@savagelegal.com</p>	<p>The City of Belle Glade</p>
<p>Gary V. Perko Hopping Green & Sams 123 S Calhoun Street PO Box 6526 Tallahassee, Florida 32314-6526 (850) 222-7500 garyp@hgslaw.com</p> <p>Mohammed Jazil Hopping, Green & Sams PO Box 6526 Tallahassee, Florida 32314 (850) 222-7500 mjazil@hgslaw.com</p> <p>Joseph P. Klock, Jr. Epstein Becker & Green 200 South Biscayne Boulevard Suite 4300, Wachovia Financial Center Miami, Florida 33131 (305) 476-7100 jklock@rascoklock.com</p>	<p>Western Palm Beach County Farm Bureau, Inc.</p>
<p>Joseph P. Klock, Jr. Epstein Becker & Green 200 South Biscayne Boulevard Suite 4300, Wachovia Financial Center Miami, Florida 33131 (305) 476-7100 jklock@rascoklock.com</p> <p>Gabriel E. Nieto Rasco Klock et al. 2555 Ponce de Leon Blvd., Suite 600 Coral Gables, Florida 33134 (305) 804-0310 gnieto@rascoklock.com</p>	<p>Roth Farms, Inc.</p>

Counsel	Representing
<p>Matthew P. Coglianese Rasco Klock, et al. 2555 Ponce de Leon Blvd. Suite 600 Coral Gables, Florida 33134 (305) 476-7100 mcoglianese@rascoklock.com</p> <p>Gary V. Perko Hopping Green & Sams 123 S Calhoun Street PO Box 6526 Tallahassee, Florida 32314-6526 (850) 222-7500 garyp@hgslaw.com</p> <p>Mohammed Jazil Hopping, Green & Sams PO Box 6526 Tallahassee, Florida 32314 (850) 222-7500 mjazil@hgslaw.com</p>	
<p>Joseph P. Klock, Jr. Epstein Becker & Green 200 South Biscayne Boulevard Suite 4300, Wachovia Financial Center Miami, Florida 33131 (305) 476-7100 jklock@rascoklock.com</p> <p>Gary V. Perko Hopping Green & Sams 123 S Calhoun Street PO Box 6526 Tallahassee, Florida 32314-6526 (850) 222-7500 garyp@hgslaw.com</p> <p>Mohammed Jazil Hopping, Green & Sams PO Box 6526 Tallahassee, Florida 32314 (850) 222-7500 mjazil@hgslaw.com</p>	K.W.B. Farms
<p>Rick J. Burgess Gunster Yoakley & Stewart PA 450 E Las Olas Boulevard, Suite 1400 Fort Lauderdale, Florida 33301 (954) 462-2000 rburgess@gunster.com</p>	United States Sugar Corporation

Counsel	Representing
<p>Robert S. Hackleman Hackleman, Olive & Judd,P.A. 2426 E. Las Olas Boulevard Fort Lauderdale, Florida 33301 (954) 334-2250 rhackleman@hojlaw.com</p> <p>Gregory M. Munson Gunster, Yoakley & Stewart, P.A. 215 S. Monroe Street, Suite 601 Tallahassee, Florida 32301 (850) 521-1980 gmunson@gunster.com</p> <p>Luna Ergas Phillips Gunster Yoakley & Steward, P.A. 450 E Las Olas Blvd., Suite 1400 Fort Lauderdale, Florida 33301-4206 (954) 462-2000 lphillips@gunster.com</p>	
<p>Charles F. Schoech Caldwell Pacetti Edwards Schoech & Viator, LLP 250 S. Australian Avenue, Suite 600 West Palm Beach, FL 33401 (561) 655-0620 schoech@caldwellpacetti.com</p>	City of Clewiston